

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1291

To be argued by
DENISE COTE

United States Court of Appeals.

FOR THE SECOND CIRCUIT

Docket No. 77-1291

UNITED STATES OF AMERICA,

Appellee,

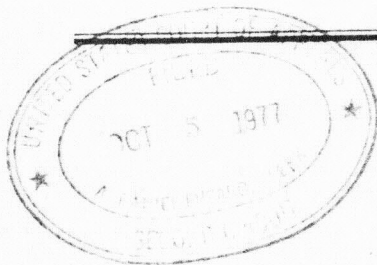
—v.—

CHRISTOPHER JOHNSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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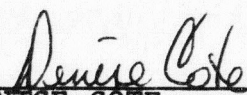
STATE OF NEW YORK)
COUNTY OF NEW YORK)

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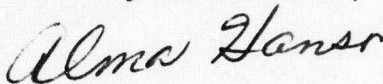

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1291

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHRISTOPHER JOHNSON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Christopher Johnson appeals from a judgment of conviction entered on June 15, 1977, in the United States District Court for the Southern District of New York after a three-day trial before the Honorable Henry F. Werker, United States District Judge and a jury.

Indictment 77 Cr. 7, filed in three counts on January 3, 1977, charged Christopher Johnson and James P. Zayas in Count One with conspiring to distribute and to possess with intent to distribute heroin in violation of Title 21, United States Code, Section 846. Counts Two and Three charged both defendants with distributing and possessing with intent to distribute on two separate occasions one-eighth, and one-quarter, respectively, of a kilogram of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.

The trial of Christopher Johnson began on May 9, 1977.* At the close of the Government's case on May 10, 1977, defendant Johnson moved to dismiss Counts One and Three of the indictment. Judge Werker denied the motion with respect to Count One and granted it with respect to Count Two. The defendant testified on his own behalf that same day. On May 11, 1977, Judge Werker rejected the Government's proffer of one surveillance witness in rebuttal. The jury returned a verdict of guilty on both remaining counts on May 12, 1977.

On June 15, 1977, Judge Werker sentenced Christopher Johnson to five years imprisonment to be followed by three years special parole on Count One and on Count Two, both sentences to run concurrently. The Court directed that the defendant was to be released from prison after twenty months and to be treated as if he were on parole for the remainder of his term of imprisonment. Christopher Johnson is currently in New York State custody for violation of parole. (S. Tr. 408).**

Statement of Facts

A. The Government's Case

The testimony from Agents of the Drug Enforcement Administration (DEA), two of whom worked in an undercover capacity and two of whom surveilled the defendant Johnson, and from a DEA informant, established that Christopher Johnson conspired with James P. Zayas to sell heroin from August through November of 1976 and that together they sold one-eighth of a kilogram

* Co-defendant James P. Zayas is a fugitive.

** As used in the Brief, "Tr." refers to the trial transcript; "S Tr." to the sentencing transcript; "App." to Appendix for Johnson; and "Br." to Brief for Johnson.

of heroin in August of 1976. The conspiracy encompassed Johnson and Zayas' sale of one-eighth of a kilogram of heroin to Special Agent Michael Pavlick and informant Carlos Medrano on August 19, 1976, negotiations between Johnson and Zayas on one hand and Agents Pavlick and Mary Buckley on the other to sell one-quarter of a kilogram of heroin on October 17, 1977, and a telephone call from Zayas to Johnson on November 3, 1977.

Agent Pavlick and informant Medrano testified about the August 19, 1976 sale of one-eighth of a kilogram of heroin. Medrano described how James Zayas introduced him to Johnson on August 17, 1977, as someone who "might be able to get heroin" for him. Tr. at 31. Over the course of negotiations on the 17th and 18th of August, Johnson told Medrano he could get him whatever quantity of white or brown heroin Medrano wanted as long as it was an eighth of a kilogram or more. (Tr. 32, 34). They agreed on the 18th of August to the sale of one-eighth of a kilogram of white heroin to be made the following day. (Tr. 35). During these negotiations, Medrano had been reporting to Agent Pavlick and had given him the license number of Johnson's car. (Tr. at 32-33, 140-41).

Agent Pavlick testified that he arrived outside Zayas' home at 1355 Shakespeare Avenue in the Bronx on August 19, 1977, with the money to purchase the heroin. Medrano met Pavlick there and informed him for the first time that Johnson refused to go to get the heroin unless he received the money ahead of time—that is, unless Pavlick "fronted" the money. (Tr. 67, 142-43). After checking with a Supervisor, Pavlick agreed to front the money. They further agreed that Pavlick would turn over the money to Johnson at Grant's Tomb, a location Johnson said was close to his source, and wait there for the heroin. (Tr. 69). Pavlick was then introduced to Zayas, who rode to Grant's Tomb with Pavlick as a

"hostage" or security until the heroin was delivered. (Tr. 145).*

Agent Burstein testified to the surveillance he conducted both at 1355 Shakespeare Avenue and at Grant's Tomb. (Tr. at 104ff). There was no surveillance of Johnson and Medrano as they drove to East 115th Street and Pleasant Avenue to pick up the heroin. Pavlick described, however, how at the time Johnson and Medrano returned to Grant's Tomb to deliver the heroin Johnson stopped Medrano as he was exiting Johnson's car and gave him a newspaper in which to conceal the package of heroin. (Tr. 151).

After the August sale, Pavlick remained in contact with Zayas. In mid-October, Zayas told Pavlick that Johnson was ready to sell two-eighths of a kilogram of brown heroin. (Tr. 158). On October 18, 1977, Agents Buckley and Pavlick travelled with Zayas to 153rd Street and Morris Avenue in the Bronx to purchase the heroin from Johnson. (Tr. 161). After meeting with Johnson alone, Zayas reported that Johnson again demanded that the money be fronted. Agent Buckley left the car with Zayas and followed Johnson for a few blocks to a point at which Zayas left Buckley at a restaurant and went to meet Johnson alone. (Tr. 246-47). Johnson refused to meet with Agent Buckley to conduct the sale, however, and the sale fell through. (Tr. 247).*

Zayas was arrested on November 4, 1977. At that time the arresting agents found an address book that had

* Pavlick had seen Johnson's car near 1355 Shakespeare Avenue when he had first arrived there. As Pavlick left with Zayas to go to Grant's Tomb he observed Johnson and Medrano walk toward Johnson's car together. (Tr. 145-46).

* Agent Michael Gray had conducted surveillance on that day and testified to seeing Johnson and Zayas meet in Johnson's car at 153rd Street. (Tr. 257).

the name "Chris" and a telephone number written in it. Zayas identified the Chris as the same one who had been involved in the August sale and the October negotiations. (Tr. 165). At Pavlick's request, he called Johnson, and, as Pavlick listened, arranged to meet with Johnson the following morning to "do a deal".* (Tr. 167-68).

Pavlick concluded his direct testimony by relating Johnson's post-arrest admission that he had driven from Grant's Tomb to Pleasant Avenue in August to get heroin. (Tr. 194). Johnson had also discussed cooperating with the Government and had informed Pavlick that "he knew a lot of people in the past when he was dealing in heroin." (Tr. 196).

B. The Defendant's Case

Christopher Johnson testified in his own behalf. He revealed a previous conviction for possession of heroin. Although he admitted meeting Carlos Medrano through James Zayas and driving Medrano back and forth to Grant's Tomb on August 19, 1977, he denied meeting with Zayas and Medrano at 1355 Shakespeare Avenue in the Bronx earlier that day or knowing that any sale of heroin was transpiring.

Johnson also admitted meeting with Zayas on October 17th. He testified that he had been playing basketball when Zayas approached him and asked if he knew where he could get drugs. Johnson told him to leave. (Tr. 285-86). Johnson also described being called by Zayas during the night of November 3, 1976, but contended that Zayas merely asked what Johnson was "doing to him" and arranged to call him the following day. (Tr. at 286-87).

* An employee of the New York Telephone Company identified the phone number as the unlisted number of Christopher Johnson. (Tr. 99-100).

Johnson testified that after his arrest he had acknowledged "taking Carlos [Medrano] to . . . Grant's Tomb" in August. (Tr. 290). But he denied admitting participation in a heroin sale. (*Id.*) In response to the Agents' inquiries about cooperation, he had merely stated that he had been out of the heroin "game" for years and that one does not "walk back into it." (Tr. 291).

On cross-examination regarding the August sale, Johnson denied having seen Medrano carry any packages as he transported him back and forth to Grant's Tomb and denied being suspicious about ferrying Medrano between Grant's Tomb and Pleasant Avenue. (Tr. 296-303). Johnson denied walking around the area near 153rd Street as described by Agent Mary Buckley on the day in October he met with Zayas. After initially denying meeting with Agent Buckley at the DEA headquarters at 57th Street after his arrest and after describing how his lawyer told him "cooperation with narcotics" would violate his parole, (Tr. 309-11), Johnson finally admitted "throw[ing Agent Buckley] a name" of a heroin supplier during a conversation at 57th Street. (Tr. 312).

ARGUMENT

POINT I

The Limitation On Inquiry Into The Informant's Place Of Residence And The Identity Of The Person With Whom The Informant Lived Was Entirely Proper.

Johnson claims that the Court refused to permit informant Medrano and Agent Pavlick to be examined on where Medrano lived and worked and the origin of Medrano's contact with Pavlick. As a result, appellant contends he was unable to explore Medrano's bias and motivation for being an informant in violation of his Sixth Amendment right to confront witnesses against him. Br. of 12. This claim is meritless. In brief, while the law allows a defendant the broadest cross-examination in order to permit the determination of the truth, the defendant's rights in this regard are not absolute, but may be conditioned both by legal requirements and by counterbalancing factual circumstances. In this case, Johnson failed to meet certain legal conditions to the kind of examination he now seeks, and in any event the district judge properly concluded that in the context of this case the matter inquired of was not a proper field of cross-examination.

The context of the rulings on cross-examination were these.* Prior to the testimony of Medrano—the first witness—Government counsel and counsel for Johnson engaged in colloquy with the Court on certain matters relating to Medrano. The Court ruled that the defense

* It is exceedingly difficult to understand from Johnson's brief the actual context of his argument on appeal since there is not a single citation to the record in the entire first point of the argument.

was entitled to know, and cross-examine Medrano about, the manner in which he had been brought from Puerto Rico to testify, but not about where he lived. Counsel for Johnson explicitly acceded to this, stating "I don't care where he lives in Puerto Rico." (Tr. 21-22). Similarly, during cross-examination of Medrano, the only objection raised by the Government that was sustained by the Court occurred when defense counsel asked a question that would tend to reveal the details of where Medrano lived or worked. While Johnson's attorney at first objected to this (Tr. 49), when Judge Werker ruled "I will permit you to ask him what he does, not where he does it," Johnson's attorney immediately stated, "That is all right. I don't really care." (Tr. 50). Other than this, the entire cross-examination of Medrano was utterly unrestricted. During the course of that cross-examination, Johnson inquired into the chronology of how Medrano met Agent Pavlick, but not into any of the details of that association.

During cross-examination of Agent Pavlick, there occurred a single limitation of the sort now claimed by Johnson. During a series of questions concerning payment that Medrano had received, Johnson asked a question concerning a third party who knew both Medrano and Agent Pavlick. At this point, the Court ruled that Johnson could not inquire into the details of this third party. (Tr. 202-03). Without framing any further questions about the relationship between Medrano and Pavlick—which clearly would have been permitted under the Court's ruling—Johnson went on to other things in a lengthy cross-examination.

Viewed in this context, Johnson's claim on appeal is entirely frivolous. First, of course, with respect to cross-examination of Medrano, Johnson waived the issue on appeal by explicitly acquiescing in the court's determina-

tion. *United States v. Fuentes*, Dkt. No. 77-1179, slip op. 5883, 5890 (2d Cir. September 14, 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, — U.S. — (June 6, 1977).

Second, with respect to the cross-examination of Pavlick, the matter of the way in which Pavlick had come to know Medrano, if it was intended to explore Medrano's bias and motivation, as Johnson asserts on appeal—was inadmissible for failure to lay a proper foundation, since the matter had not been the subject of any inquiry of Medrano at all. As this Court has twice noted in the last year, when an opponent attacks a witness by means of an extrinsic showing of bias or motivation or of a prior inconsistent statement, the cross-examiner must first confront the witness and lay a foundation. *United States v. DiNapoli*, 557 F.2d 962, 965 (2d Cir. 1977); *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976); see also *United States v. Kahn*, 472 F.2d 272, 281-82 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). See generally F. R. Evid. 613(b).

Finally, and most conclusively, Judge Werker acted well within his discretion in imposing the extremely modest restrictions upon cross-examination.* While on appeal Johnson engages in highly imaginative speculations about what the product of such additional cross-examination might have been, his explicit acquiescence in the limitations on cross of Medrano and his hasty change of subject during the cross of Pavlick indicates that he did

* In other areas, although Johnson does not acknowledge the point, Judge Werker allowed Johnson far more than that to which he was entitled. For example, while the law clearly does not allow cross examination about arrests that did not lead to convictions, Judge Werker told defense counsel "you may bring out every one of the arrests of informant Medrano, Mr. Joy... [d]espite the Federal Rules." (Tr. 22-23).

not think so at trial.* Furthermore, the limits placed on cross-examination were particularly appropriate given the definite security risk imposed by any questions that would reveal the details of Medrano's residence or the identity of the third party who knew both Medrano and Pavlick.** As this Court has recently reiterated in a case where such details about a witness were more emphatically requested and more important to the defense, a trial court is not powerless to shield such witnesses from unnecessary questions unless the inquiry is truly necessary. *United States v. Cavallaro*, 553 F.2d 300 (2d Cir. 1977); see also *United States v. Persico*, 425 F.2d 1375, 1383-84 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States v. Baker*, 419 F.2d 83, 87 (2d Cir.), *cert. denied*, 397 U.S. 971 (1969); *United States v. Bennett*, 409 F.2d 888, 901 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969). This case is even a clearer one for restricting inquiry than is normally presented since the Government's concern arose primarily from a desire to protect a third party rather than the desire to protect the witness himself. (Tr. 202).

Finally, of course, this Court's scope of review is exceedingly small. It has long been the law that the extent and scope of cross-examination is left primarily to the trial judge, and will be reviewed only for clear abuse of discretion. *United States v. Martinez-Carcano*, 557 F.2d 966, 970 (2d Cir. 1977); *Alford v. United States*, 282 U.S. 687, 694 (1931); *United States v. Corr*, 543

* Indeed, Judge Werker had the definite impression that the cross-examination had no purpose at all. At the time of his ruling on the cross-examination of Pavlick, he stated to defense counsel, "And I wish you would get down to the brass tacks of this case. You are going all over the lot." (Tr. 203).

** It should be emphasized that this third party did not have anything to do with, or any knowledge of, the facts before the jury.

F.2d 1042 (2d Cir. 1976); *United States v. Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976); *United States v. Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); see generally, *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). Judge Werker, who clearly allowed Johnson more than ample cross-examination on everything that mattered, surely did not abuse that discretion.*

POINT II

The Charge Was Proper In All Respects.

A. Credibility of Witnesses

Johnson argues that Judge Werker ignored his request that the charge evaluating the defendant's testimony be included with the charge on evaluating the credibility of the witnesses' testimony generally. Because the two charges were not joined, he asserts that

* The propriety of the balance struck by Judge Werker is, of course, apparent from the relatively little interest shown by Johnson at trial in this area of cross-examination. Furthermore, Johnson grossly exaggerates Medrano's importance to the Government's case. Medrano participated in only one of the three series of events that constituted the Government's proof of the Johnson-Zayas conspiracy, albeit the only one that culminated in a sale. Furthermore, Medrano's testimony about that sale was corroborated in important respects by Agent Pavlick. Prior to the day of the sale Medrano had given the license number of the person with whom he was negotiating to Pavlick. That license number was Johnson's. Pavlick saw Johnson at the meeting with Zayas and Medrano at 1355 Shakespeare Avenue prior to the sale, an occurrence which Johnson denied, and he saw Johnson stop Medrano as he was exiting Johnson's car to deliver the heroin and hand Medrano a newspaper in which to hide the package.

he was denied the opportunity for a fair evaluation of his credibility and the credibility of the informant.

Contrary to Johnson's assertion, however, the two charges were placed together as requested by the defendant. The charge on the defendant's credibility and on the witnesses' credibility starts at 392 of the transcript and concludes in eleven consecutive and integrated paragraphs. Johnson's failure to object to the order, placement or content of the charge (Tr. 400) is further evidence that Judge Werker adopted his request. Thus, the assertion of error has been waived unless there was plain error. Rules 30 and 52 of the Federal Rules of Criminal Procedure; *United States v. Di Stefano*, 555 F.2d 1094, 1104 (2d Cir. 1977).

Johnson now raises for the first time the claim that it was plain error to instruct the jury that the "interest of a defendant is of a character possessed by no other witness" (Tr. at 394), and not to give a cautionary instruction regarding the informant's interest.

There is no requirement that the giving of one charge necessitates the giving of the other charge. The charge on the special interest of the defendant is entirely proper, as this Court has repeatedly noted. *United States v. Tol-kow*, 532 F.2d 853, 859 (2d Cir. 1976); *United States v. Martin*, 525 F.2d 703, 706 (2d Cir. 1975); *United States v. Tyers*, 487 F.2d 828, 831 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974). The charge on scrutinizing the informant's testimony is not mandatory. Even in cases in which a court omitted a special charge on the interest of an accomplice, a charge to which courts attach great importance, courts have not automatically reversed convictions for failure to caution the jury. See *United States v. Floyd*, 555 F.2d 45, 47 (2d Cir. 1977); *Cf. United States v. Daniels*, 558 F.2d 122, 127 (2d Cir. 1977). Given the circumstances of this case, there was no error

—and certainly no plain error—to avoid special mention of the informant's credibility.*

B. Conspiracy with an Informant

Johnson claims that Judge Werker erred in not charging the jury that joint activity between an informant and defendant can not constitute a conspiracy. (Br. at 22). At the conclusion of the charge the defendant requested such a charge (Tr. 400), and renewed the request after the jury asked for the legal definition of possession with intent to distribute. (Tr. at 411; App. Ex. D, Ct. Ex. 8). Judge Werker denied the requests on the grounds the jury had the indictment and was aware of who was accused of being a co-conspirator with Johnson. (Tr. 411). This ruling was proper.

In the context of this case it is absolutely impossible to assert that the jury could have found Johnson guilty on the conspiracy count by assuming he conspired with Medrano instead of Zayas. Medrano only had contact with Johnson in August of 1976 when he arranged for the sale of the eighth of a kilogram of heroin. In support of the conspiracy charge the Government introduced

* In support of his argument that special charge on the informant's interest was necessary, Johnson states that proof of the informant's interest had been forbidden. This is entirely misleading. In addition to emphasizing the monetary rewards to Medrano for his DEA work, defense counsel argued on summation that to Medrano his work as an informant amounted "to a license to steal." (Tr. 345). This comment was based on testimony that after the August sale Medrano had been arrested in Florida for possession of counterfeit money. After his arrest Medrano made it known to the Florida authorities that he was a DEA informant, a fact which was confirmed by Agent Pavlick. Furthermore, there was evidence at trial that Pavlick had learned of Medrano through a mutual associate.

evidence of Zayas and Johnson conspiring together to distribute drugs in August, October and November. In addition to the evidence clearly indicating that the alleged conspirators were Johnson and Zayas, the openings (*see, e.g.* Tr. at 9), summations (*see, e.g.* Tr. at 353, 362, 364), and charge (Tr. 370, 371, 372, 373, 382, 383), all directed the jury's attention to deciding whether there was a conspiracy between Zayas and Johnson. Indeed, the Court told the jury that they might have to determine the nature of the participation of Zayas in order to assess Johnson's guilt despite the fact that Zayas was not on trial. (Tr. 370).

In support of his argument Johnson asks the Court to draw some startling inferences. First, he suggests that the jury could have believed that Medrano was the unknown person described by the phrase in the indictment charging Johnson, Zayas and others unknown with conspiracy. To hold such a belief the jury would both have to ignore the reference to and evidence concerning Zayas and have to assume that the grand jury did not understand a central feature of the case, i.e., that Medrano was a government agent. Second, Johnson points to the jury's request for a definition of entrapment as an indication that the jury thought Medrano and Johnson entered into an agreement. In fact, if it reveals anything, and it is preferable not to second guess the jury, quite obviously a request for an entrapment charge reveals that the jury thought of Medrano as an overreaching government agent rather than as a co-conspirator. Given the evidence at trial and the charge to the jury, the requested instruction on Medrano's inability to be a co-conspirator, might have needlessly complicated the law on conspiracy and "might have led the jury away from the truth rather than toward it." *United States v. Marchand*, Dkt. No. 77-1131, slip op. 5391, 5418 (2d Cir. August 22, 1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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